OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

February 11, 2008

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Edilio Mejia**
Tax Registry No. 917023
Detective Borough Bronx
Disciplinary Case Nos. 77810/02, 78003/02 & 79630/04

The above named member of the service appeared before Assistant Deputy Commissioner Robert W. Vinal on March 1, 2005 and was charged with the following:

DISCIPLINARY CASE NO. 77810/02

1. Said Police Officer Edilio Mejia, assigned to Police Service Area #4, on Monday, January 14, 2002, at approximately 0545 hours, in front of 501 West 170th Street, within the confines of the 33rd Precinct, operated a motor vehicle while under the influence of alcohol, in that: Officer Mejia was observed by two (2) members of the service, known to the Department, seated in the driver's seat of a red Jeep [redacted] NY registration number [redacted] which had apparently come to a stop in the middle of the thoroughfare in front the above location and which remained in gear with the engine running. The above mentioned officers further observed that Officer Mejia was apparently asleep, at which time they attempted to awaken him by knocking on the vehicle window, opening the vehicle door and physically shaking him, and splashing water on his face. When Officer Mejia finally awakened he became abusive and belligerent, at which time the above mentioned officers detected a strong odor of alcohol on him. The Duty Captain responded and observed that Officer Mejia was unsteady on his feet, had slurred speech, and smelled of alcohol.

P.G. 203-10, Page 1, Paragraph 4 PROHIBITED CONDUCT
VTL 1192 – OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF ALCOHOL

2. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at approximately 0545 hours, in front of 501 West 170th Street, within the confines of the 33 Precinct, resisted arrest in that: the above mentioned officers, one of whom was a police supervisor, believing they had probable cause that Officer Mejia was driving while intoxicated, ordered him to exit his vehicle, at which time he refused. Officer Mejia subsequently struggled with the above mentioned officers as they forced him out of his vehicle.

P.G. 203-10, Page 1, Paragraph 4 PROHIBITED CONDUCT
NYS PENAL SECTION 205.30 - RESISTING ARREST

3. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, on January 14, 2002, at approximately 0730 hours, at the Intoxicated Driver Testing Unit, located inside the 28th Precinct, was ordered to submit to a Breathalyzer and a physical examination, at which time he refused.

P.G. 203-03, Page 1, Paragraph 2 **COMPLIANCE WITH ORDERS**

4. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, on January 14, 2002, at approximately 0545 hours, in front of 501 West 170th Street, within the confines of the 33rd Precinct, while intoxicated, was in possession of his Department firearm.

P.G. 203-04, Page 1, Paragraph 3 **FITNESS FOR DUTY**

5. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, on January 14, 2002, at approximately 0545 hours, in front of 501 West 170th Street, within the confines of the 33rd Precinct, operated his motor vehicle with an expired registration and lapsed insurance.

P.G. 203-10, Page 1, Paragraph 4 **PROHIBITED CONDUCT**

DISCIPLINARY CASE NO. 78003/02

1. Said Police Officer Edilio Mejia, assigned to Housing Bureau Viper #8, on or about June 19, 2002, as approximately 1527 hours, operated a motor vehicle, to wit: a [redacted] Toyota, New York registration #[redacted] on a public highway while knowing or having reason to know that his license was suspended and said suspension was based on a refusal to take a Breathalyzer examination.

P.G. 203-10, Page 1, Paragraph 4 **PROHIBITED CONDUCT**
NYS VTL 511(2)(ii) - AGGRAVATED UNLICENSED OPERATION OF A MOTOR VEHICLE IN THE SECOND DEGREE

2. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, on or about June 19, 2002, at approximately 1527 hours, operated a motor vehicle without a license, to wit: a [redacted] Toyota, New York registration [redacted]

P.G. 203-10, Page 1, Paragraph 4 **PROHIBITED CONDUCT**
NYS VTL 509 (1) – UNLICENSED OPERATOR

DISCIPLINARY CASE NO. 79630/04

1. Said Police Officer Edilio Mejia, assigned to Police Service Area #4, while off duty, on or about November 6, 1998, at approximately 0110 hours, in the vicinity of First Avenue and East 86th Street, New York County, under circumstances evincing a depraved indifference to human life, recklessly engaged in conduct which created a grave risk of death to a person, identity known to the Department, and thereby caused serious physical injury to said person.

P.G. 203-10, Page 1, Paragraph 4 **PROHIBITED CONDUCT**
NYS PENAL LAW SECTION 120.10(3) – ASSAULT IN THE FIRST DEGREE

2. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, recklessly caused serious physical injury to a person, identity known to the Department, by means of a deadly weapon or a dangerous instrument, that being a motor vehicle.

P.G. 203-10, Page 1, Paragraph 4 PROHIBITED CONDUCT
NYS PENAL LAW SECTION 120.05(4) - ASSAULT IN THE SECOND DEGREE

3. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, with criminal negligence caused serious physical injury to a person, identity known to the Department, by operation of a vehicle in violation of subdivision three of section eleven hundred ninety-two of the Vehicle and Traffic Law.

P.G. 203-10, Page 1, Paragraph 4 PROHIBITED CONDUCT
NYS PENAL LAW SECTION 120.03 - VEHICULAR ASSAULT IN THE SECOND DEGREE

4. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, recklessly caused physical injury to a person, identity known to the Department.

P.G. 203-10, Page 1, Paragraph 4 PROHIBITED CONDUCT
NYS PENAL LAW SECTION 120.00(2) - ASSAULT IN THE THIRD DEGREE

5. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, with criminal negligence, caused physical injury to a person, identity known to the Department, by means of a deadly weapon or a dangerous instrument, that being a motor vehicle.

P.G. 203-10, Page 1, Paragraph 4 PROHIBITED CONDUCT
NYS PENAL LAW SECTION 120.00(3) - ASSAULT IN THE THIRD DEGREE

6. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, possessed a motor vehicle with intent to use the same unlawfully against another.

P.G. 203-10, Page 1, Paragraph 4 PROHIBITED CONDUCT
NYS PENAL LAW SECTION 265.01(2) - CRIMINAL POSSESSION OF A WEAPON IN THE FOURTH DEGREE

7. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, operated a motor vehicle while his ability to operate such motor vehicle was impaired by the consumption of alcohol.

P.G. 203-10, Page 1, Paragraph 4 PROHIBITED CONDUCT
NYS VTL SECTION 1192(1) - OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL

8. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, operated a motor vehicle having .10 of one percent or more by weight of alcohol in his blood.

P.G. 203-10, Page 1, Paragraph 4 PROHIBITED CONDUCT
NYS VTL SECTION 1192(2) - OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL

9. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, operated a motor vehicle while in an intoxicated condition.

P.G. 203-10, Page 1, Paragraph 4 PROHIBITED CONDUCT
NYS VTL SECTION 1192(3) - OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL

10. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, having no right to do so nor any reasonable ground to believe that he had such right, recklessly damaged property of a person, identity known to the Department, that being a motor vehicle, in an amount exceeding two hundred and fifty dollars.

P.G. 203-10, Page 1, Paragraph 4 PROHIBITED CONDUCT
NYS PENAL LAW SECTION 145.00(3) - CRIMINAL MISCHIEF IN THE FOURTH DEGREE

In a Memorandum dated November 27, 2007, Assistant Deputy Commissioner Vinal found the Respondent GUILTY of Specification Nos. 1, 2, 3, 4 and Dismissed Specification No. 5 in Disciplinary Case No. **77810/02,** and Dismissed both Specifications in Disciplinary Case No. **78003/02,** and Not Guilty of Specification No. 1, Guilty of Specification Nos. 2 and 8 and Dismissed Specification Nos. 3, 4, 5, 6, 7, 9, and 10 in Disciplinary Case No. **79630/04.** Having read the Memorandum and analyzed the facts of these instant matters, I approve the findings, but disapprove the penalty.

I concur with Assistant Deputy Commissioner Vinal's assessment that Respondent Mejia's misconduct, behavior and course of conduct compromises his ability to remain a viable member of this Department; thus, the Respondent's immediate separation from the Department is required.

Although Assistant Deputy Commissioner Vinal recommends that Respondent Mejia be summarily dismissed, I will permit an alternative manner of separation from the Department at this time. It is therefore directed that a post-trial vested-interest retirement agreement be implemented with the Respondent. In consideration of such, Respondent Mejia is to forfeit all suspension days since served and to be served in this matter, and will remain on suspended duty status until and upon his final date of separation from the Department. All accrued leave and time balances are to be forfeited and a One-Year Dismissal Probation period will be immediately imposed.

Such vested-interest retirement shall also include Respondent Mejia's written agreement to not initiate administrative applications or judicial proceedings against the New York City Police Department to seek reinstatement or return to the Department. If Respondent Mejia does not agree to the terms of this vested-interest retirement as noted, this Office is to be notified without delay whereupon summary dismissal from the Department may then be imposed. This agreement is to be implemented ***IMMEDIATELY.***

Raymond W. Kelly
Police Commissioner

The City of New York

POLICE DEPARTMENT

DISMISSAL PROBATION

0001 HRS. FEBRUARY 11, 2008 TO
2400 HRS. February 10, 2009

November 27, 2007

In the Matter of the Charges and Specifications : Case Nos. 77810/02, 78003/02 & 79630/04

- against - :

Police Officer Edilio Mejia :

Tax Registry No. 917023 :

Detective Borough Bronx :

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Robert W. Vinal
Deputy Commissioner - Trials

APPEARANCE:

For the Department: Paul McCullagh, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: Stacey Van Malden, Esq.
6629 Broadway – Suite 7H
Bronx, N.Y. 10471

To:

HONORABLE RAYMOND W. KELLY
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

resulted in serious physical injury to the driver of the taxi his vehicle struck. The Respondent asserted at this trial that he is a changed man and that he no longer drinks alcohol. However, based on his testimony that he presently attends Alcoholics Anonymous meetings only "once in a while, not that often," his claim that he is certain that he will never again drink alcohol or engage in alcohol-related misconduct is not convincing, and the reliability of his assertion that the Department can rest assured that he will never again operate a motor vehicle while under the influence of alcohol is open to question.

I recommend that the Respondent be DISMISSED from the New York City Police Department.

Respectfully submitted,

Robert W. Vinal
Assistant Deputy Commissioner - Trials

In the Matter of the Disciplinary Proceedings	:	
- against -	:	FINAL
Police Officer Edilio Mejia	:	ORDER
Tax Registry No. 917023	:	OF
Detective Borough Bronx	:	DISMISSAL

Police Officer Edilio Mejia, Tax Registry No. 917023, Shield No. 00627, Social Security No. ending in [redacted] having been served with written notice, has been tried on written Charges and Specifications numbered 77810/02, 78003/02 & 79630/04 as set forth on form P.D. 468-121, dated February 12, 2002, June 25, 2002 and February 3, 2004, respectively, and after a review of the entire record, has been found Guilty as Charged of Specification Nos. 1-4 in Disciplinary Case No.77810/02; and Guilty as charged of Specification Nos. 2 and 8 in Disciplinary No.79630/04.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Edilio Mejia from the Police Service of the City of New York.

RAYMOND W. KELLY
POLICE COMMISSIONER

EFFECTIVE:

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In the Matter of the Charges and Specifications	:	Case Nos. 77810/02, 78003/02 & 79630/04
- against -	:	
Police Officer Edilio Mejia	:	
Tax Registry No. 917023	:	
Detective Borough Bronx	:	

----------x

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Robert W. Vinal
Deputy Commissioner - Trials

A P P E A R A N C E:

For the Department: Paul McCullagh, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: Stacey Van Malden, Esq.
6629 Broadway – Suite 7H
Bronx, N.Y. 10471

To:

HONORABLE RAYMOND W. KELLY
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

The above-named member of the Department appeared before me on March 1, 2, 3 and 4, 2005,[1] and on March 29, May 3 and May 22, 2007,[2] charged with the following:

Disciplinary Case No. 77810/02

1. Said Police Officer Edilio Mejia, assigned to Police Service Area #4, on Monday, January 14, 2002, at approximately 0545 hours, in front of 501 West 170th Street, within the confines of the 33rd Precinct, operated a motor vehicle while under the influence of alcohol, in that: Officer Mejia was observed by two (2) members of the service, known to the Department, seated in the driver's seat of a red Jeep Cherokee, NY registration number [redacted] which had apparently come to a stop in the middle of the thoroughfare in front the above location and which remained in gear with the engine running. The above mentioned officers further observed that Officer Mejia was apparently asleep, at which time they attempted to awaken him by knocking on the vehicle window, opening the vehicle door and physically shaking him, and splashing water on his face. When Officer Mejia finally awakened he became abusive and belligerent, at which time the above mentioned officers detected a strong odor of alcohol on him. The Duty Captain responded and observed that Officer Mejia was unsteady on his feet, had slurred speech, and smelled of alcohol.

P.G. 203-10, Page 1, Paragraph 4 - PROHIBITED CONDUCT
VTL 1192 - OPERATING A MOTOR VEHICLE
UNDER THE INFLUENCE OF ALCOHOL

2. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at approximately 0545 hours, in front of 501 West 170th Street, within the confines of the 33 Precinct, resisted arrested in that: the above mentioned officers, one of whom was a police supervisor, believing they had probable cause that Officer Mejia was driving while intoxicated, ordered him to exit his vehicle, at which time he refused. Officer Mejia subsequently struggled with the above mentioned officers as they forced him out of his vehicle.

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[1] On March 4, 2005, trial proceedings were suspended at the request of the Assistant Department Advocate ("ADA"). The ADA requested time to apply to the Supreme Court of the State of New York, New York County, for the issuance of a *subpoena duces tecum* requiring New York Presbyterian Hospital ("the hospital") to produce any medical record which documented the testing of any blood withdrawn from the Respondent at the hospital on November 6, 1998. On September 30, 2005, the ADA's application was denied by Justice Doris Ling-Cohan who ruled that the ADA should have requested that the trial commissioner issue a *subpoena duces tecum* pursuant to Administrative Code § 14-137. On November 29, 2005, the undersigned granted the ADA's application and signed a *subpoena duces tecum* directing the hospital to produce the blood testing results by February 9, 2006. When the hospital refused to comply with the *subpoena duces tecum,* the ADA applied to the Supreme Court of the State of New York, New York County, for a order compelling the hospital to comply with the *subpoena duces tecum*. On February 9, 2007, Justice Nicholas Figueroa filed an order directing the hospital to comply with the *subpoena duces tecum*. After the hospital complied with this order, trial proceedings were immediately resumed.

[2] The trial record was held open until July 27, 2007 for the admission of written summations.

P.G. 203-10, Page 1, Paragraph 4 - PROHIBITED CONDUCT
NYS PENAL SECTION 205.30 - RESISTING ARREST

3. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, on January 14, 2002, at approximately 0730 hours, at the Intoxicated Driver Testing Unit, located inside the 28th Precinct, was ordered to submit to a Breathalyzer and a physical examination, at which time he refused.

P.G. 203-03, Page 1, Paragraph 2 - COMPLIANCE WITH ORDERS

4. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, on January 14, 2002, at approximately 0545 hours, in front of 501 West 170th Street, within the confines of the 33rd Precinct, while intoxicated, was in possession of his Department firearm.

P.G. 203-04, Page 1, Paragraph 3 - FITNESS FOR DUTY

5. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, on January 14, 2002, at approximately 0545 hours, in front of 501 West 170th Street, within the confines of the 33rd Precinct, operated his motor vehicle with an expired registration and lapsed insurance.

P.G. 203-10, Page 1, Paragraph 4 - PROHIBITED CONDUCT

Disciplinary Case No. 78003/02

1. Said Police Officer Edilio Mejia, assigned to Housing Bureau Viper #8, on or about June 19, 2002, at approximately 1527 hours, operated a motor vehicle, to wit: a [redacted] Toyota, New York registration [redacted], on a public highway while knowing or having reason to know that his license was suspended and said suspension was based on a refusal to take a Breathalyzer examination.

P.G. 203-10, Page 1, Paragraph 4 - PROHIBITED CONDUCT
NYS VTL 511(2)(ii) - AGGRAVATED UNLICENSED OPERATION
OF A MOTOR VEHICLE IN THE SECOND DEGREE

2. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, on or about June 19, 2002, at approximately 1527 hours, operated a motor vehicle without a license, to wit: a [redacted] Toyota, New York registration [redacted]

P.G. 203-10, Page 1, Paragraph 4 - PROHIBITED CONDUCT
NYS VTL 509(1) - UNLICENSED OPERATOR

Disciplinary Case No. 79630/04

1. Said Police Officer Edilio Mejia, assigned to Police Service Area #4, while off duty, on or about November 6, 1998, at approximately 0110 hours, in the vicinity of First Avenue and East 86th Street, New York County, under circumstances evincing a depraved indifference to human life, recklessly engaged in conduct which created a grave risk of death to a person, identity known to the Department, and thereby caused serious physical injury to said person.

P.G. 203-10, Page 1, Paragraph 4 - PROHIBITED CONDUCT
NYS PENAL LAW SECTION 120.10(3) - ASSAULT IN THE FIRST DEGREE

2. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, recklessly caused serious physical injury to a person, identity known to the Department, by means of a deadly weapon or a dangerous instrument, that being a motor vehicle.

P.G. 203-10, Page 1, Paragraph 4 - PROHIBITED CONDUCT
NYS PENAL LAW SECTION 120.05(4) - ASSAULT IN THE SECOND DEGREE

3. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, with criminal negligence, caused serious physical injury to a person, identity known to the Department, by operation of a vehicle in violation of subdivision three of section eleven hundred ninety-two of the Vehicle and Traffic law.

P.G. 203-10, Page 1, Paragraph 4 - PROHIBITED CONDUCT
NYS PENAL LAW SECTION 120.03 - VEHICULAR ASSAULT IN THE SECOND DEGREE

4. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, recklessly caused physical injury to a person, identity known to the Department.

P.G. 203-10, Page 1, Paragraph 4 - PROHIBITED CONDUCT
NYS PENAL LAW SECTION 120.00(2) - ASSAULT IN THE THIRD DEGREE

5. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, with criminal negligence, caused physical injury to a person, identity known to the Department, by means of a deadly weapon or a dangerous instrument, that being a motor vehicle.

P.G. 203-10, Page 1, Paragraph 4 - PROHIBITED CONDUCT
NYS PENAL LAW SECTION 120.00(3) - ASSAULT IN THE THIRD DEGREE

6. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, possessed a motor vehicle with intent to use the same unlawfully against another.

P.G. 203-10, Page 1, Paragraph 4 - PROHIBITED CONDUCT
NYS PENAL LAW SECTION 265.01(2) - CRIMINAL POSSESSION OF OF A WEAPON IN THE FOURTH DEGREE

7. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, operated a motor vehicle while his ability to operate such motor vehicle was impaired by the consumption of alcohol.

P.G. 203-10, Page 1, Paragraph 4 - PROHIBITED CONDUCT
NYS VTL SECTION 1192 (1) - OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL

8. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, operated a motor vehicle having .10 of one percent or more by weight of alcohol in his blood.

P.G. 203-10, Page 1, Paragraph 4 - PROHIBITED CONDUCT
NYS VTL SECTION 1192(2) - OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL

9. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, operated a motor vehicle while in an intoxicated condition.

P.G. 203-10, Page 1, Paragraph 4 - PROHIBITED CONDUCT
NYS VTL SECTION 1192(3) - OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL

10. Said Police Officer Edilio Mejia, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, having no right to do so nor any reasonable ground to believe that he had such right, recklessly damaged property of a person, identity known to the Department, that being a motor vehicle, in an amount exceeding two hundred and fifty dollars.

P.G. 203-10, Page 1, Paragraph 4 - PROHIBITED CONDUCT
NYS PENAL LAW SECTION 145.00(3) - CRIMINAL MISCHIEF IN THE FOURTH DEGREE

The Department was represented by Paul McCullagh, Esq., Department Advocate's Office, and the Respondent was represented by Stacey Van Malden, Esq.

The Respondent, through his counsel, entered pleas of Guilty to certain charges and pleas of Not Guilty to the remaining charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 77810/02

The Respondent pleaded Guilty to Specification Nos. 1 through 4. The Department moved to dismiss Specification No. 5.

Disciplinary Case No. 78003/02

The Department moved to dismiss both of the charged Specifications.

Disciplinary Case No. 79630/04

The Respondent is found Guilty of Specification Nos. 2 and 8. The Respondent is found Not Guilty of Specification No. 1. The Department moved to dismiss Specification No. 6. It is recommended that Specification Nos. 3, 4, 5, 7, 9 and 10 be dismissed.

EVIDENCE

The Department's Case

The Department called Joan Roney, Eric Goldin, Johanna Viksne, Alexander Greenberg, Joanne Mercado, Nicholas Bellizzi and Matthew Johnson as witnesses.

Joan Roney

Roney, who is [redacted]-years-old and works at a pet service collective caring for and training dogs, and who resides in Manhattan, testified that on November 6, 1998 at about 1:00 a.m., she was walking north on First Avenue to a friend's house to walk her dogs, when she observed a vehicular accident at the corner of First Avenue and 86th Street. Roney recalled that a yellow cab that had been driving eastbound on 86th Street, a two-way road, was struck by a blue car which was traveling northbound on First Avenue. Roney recalled that her attention was directed to the accident when she heard a loud collision. She testified that the traffic signal at the intersection of 86th Street and First Avenue was green for traffic traveling on 86th Street. She testified that at the time the accident occurred, she was standing on the southeast corner of the intersection waiting for the crossing signal to change so that she could walk across 86th Street to the northeast corner of the intersection. She recalled that as she stood at the corner, the pedestrian signal at the northeast corner of the intersection was a steady "Don't Walk." She testified that she then heard screeching brakes and when she looked to her left she saw the blue car had struck the yellow cab and that the cab had been pushed up over the curb onto the sidewalk where it hit a sign near her. She testified that she immediately went over to the cab and saw that there was a body on the front floor of the cab. Someone got out of the cab and ran away. She testified that she went over to the blue car and observed the male driver sitting upright in the driver's seat. His forehead was bleeding as she moved to within "inches of him." When she asked him, "Are you okay?" he did not respond. She observed that he was "red-faced, eyes watery, glassy." She testified that the driver of the blue car, "reeked of alcohol." She testified that the driver's speech was "mumbled" and

"slurred." She testified that she is familiar with and can recognize the smell of alcohol on a person because her brother is an alcoholic. She testified that within a short time, about ten police officers arrived at the scene. She stated that none of them went over to the cab and that all of them went over to where the blue car had come to a halt. She testified that she told one of the responding police officers, "You know he's drunk. Come over to the cab." She recalled that this officer asked her, "How do you know he's drunk?" She recalled that she told another officer that she needed to give her statement for the Accident Report. She testified that she said this "at least six times." An officer told her that there was no need for her to provide a statement and that she could go home. She testified that she wanted to provide a statement because she was aware that the driver of the blue car "is drunk," and that she had seen him drive through a red light and strike the cab.

On cross-examination, Roney was asked whether on January 20, 2001, at President Bush's inauguration she had run topless with a political message written in magic marker on her body. She responded, "Yes." She also acknowledged that she had been arrested at the Republican National Convention but that she was not protesting at the time she was arrested.

Roney was confronted with statements she made at an interview on June 24, 2001. She acknowledged that she had stated at this interview, "I had seen and read about crazy cab drivers but this cab driver was not driving crazy." She testified that she had observed that the windshield of the blue car was cracked. The window on the driver's side of the blue car was down. She acknowledged that she became upset because the responding police officers had ignored the man inside the cab.

Eric Goldin

Goldin, who was born on [redacted] testified that during November, 1998, he was employed as a cab driver. He testified that his hobbies included karate, in which he was a black belt, kickboxing, and playing two musical instruments. He recalled that on Thursday, November 5, 1998, he was scheduled to work a 5:00 p.m. to 5:00 a.m. shift driving a yellow taxi cab. He testified that at that point in time, Johanna Viksne was his girlfriend and that he married her in July of 2003. Goldin recalled that shortly after 1:00 a.m. on November 6, 1998, he picked up a passenger whose name he later learned was Greenberg. Greenberg requested that Goldin drive him to the intersection of First Avenue and 86th Street. Goldin recalled that when he stopped the cab at the intersection on the west side of First Avenue, Greenberg asked him, "Could you take me across First Avenue?" Since the light on 86th Street was red, Goldin waited until it turned green and then started to drive through the intersection eastbound on 86th Street. He testified that he "made it about halfway through the light" and that he was traveling at a speed of 15 to 20 miles per hour, when he felt an impact and the airbag deployed and scraped his face. He testified that the cab was spun around as a result of the impact and that he was thrown to the floor. He testified that he had no feeling in his arms and legs and that he realized that he was paralyzed. He was removed by ambulance to New York Hospital where he was admitted for three days and then transferred to Mount Sinai Hospital. When he was released from Mount Sinai Hospital in April of 1999, he was "a quadriplegic." He testified that he now has some mobility in his hands and his legs. He still needs 24-hour assistance because he cannot dress himself, feed himself, or use the toilet without assistance. He testified that he filed a civil action against the Blue Moon Grill.

A settlement was reached under which the Blue Moon Grill paid him a total of $1.4 million dollars, of which he received a cash payment of $90,000 and he receives a monthly payment of $1,300. He testified that the Respondent's automobile insurer, Geico, paid a claim in the amount of $25,000.

On cross-examination, when Goldin was asked what time he woke up on November 5, 1998 to start his 5:00 p.m. cab shift that day, he responded that he could not recall. When he was asked what time the accident had occurred, he testified that it was sometime between 1:00 a.m. and 2:00 a.m., but closer to 1:00 a.m. He was confronted with a prior interview at which he had told the interviewer that the accident had occurred at 2:15 a.m. He was then confronted with an interview he had given to Sergeant Gilroy at which he had stated that the accident had occurred at 1:10 a.m. When Goldin was asked if he had told Sergeant Gilroy that he had to be "cut out" of the taxi cab, he testified that he had no recollection of having said that to Sergeant Gilroy. [The parties stipulated that Gilroy wrote this in his interview report. The parties further stipulated that on the Emergency Medical Services (EMS) report, the EMS technician wrote that Goldin had asked, "What hit me?" and that he also wrote "Patient states he doesn't remember what happened.] Goldin acknowledged that on July 25, 2000, during a sworn deposition regarding his civil suit against the Respondent, he was asked whether he had stopped his cab before he went through the light at First Avenue. He adopted the answer he had given at this deposition that he had stopped because he had to wait for the light to turn green so that he could continue traveling eastbound on 86th Street. Goldin acknowledged that at a deposition he gave on February 11, 2002, when he was asked whether he was letting his passenger get out of the car at the intersection, that he had stated that the light

was still green. Goldin testified that he was not wearing a seatbelt at the time of the accident. He was confronted with statements he made at his depositions that he could not recall whether he was wearing a seatbelt. Goldin testified that he did not apply his brakes before the Respondent's car hit his cab because he did not see the Respondent's car traveling northbound on First Avenue as it entered the intersection.

Goldin testified that he suffers from [redacted]. He denied that he ever told a nurse at the hospital that he had used cocaine. When he was asked if he had smoked any marijuana on November 5 or November 6, 1998, he responded that he had not, although he acknowledged that he was aware that his toxicity screening test indicated a positive for marijuana. When he was asked if he had started feeling tired after midnight on the night of the accident, he testified "not especially." He testified that he suffered no out-of-pocket expenses as a result of the accident because of the settlement he received in his civil action and workers compensation benefits that he had received.

Johanna Viksne

Viksne, who [redacted] is employed as a travel agent and resides in Manhattan, testified that on November 6, 1998, she received a telephone call that Goldin was in the emergency room at New York Hospital. She arrived at the hospital about 40 minutes later. When she spoke to Goldin he told her, "I can't move." A hospital employee informed her that Goldin's property was in a nearby room. When she attempted to enter the room to get Goldin's personal property, two police officers initially blocked the door to the room. When she was able to get inside the room, the Respondent, who she identified in the trial room, was lying on a bed asleep with his hands behind his head.

She testified that she smelled alcohol on the Respondent and that she observed a puddle on the floor and that she saw that the Respondent's pants were wet. She saw a bag that contained Goldin's personal belongings on the other side of the room. When she crossed the room to get the bag, she passed within two feet of the Respondent. As she was leaving, she asked the police officers whether the Respondent had been given a field sobriety test. The officers responded in a defensive manner, "Why would we do such a thing?"

One week after the accident, she telephoned Goldin's employer to find out where the cab he had been driving was located. She then went to the garage where the cab company had told her the tow company had taken the cab for storage. She brought her camera with her and took three photographs of the cab [Department's Exhibit (hereafter DX) 1, 2 and 3].

. On cross-examination, Viksne testified that while she was present in the room in which the Respondent was lying on the bed, she did not notice any bandages or a catheter or a neck brace on the Respondent. She recalled that she provided a statement regarding the accident investigation. When she was asked whether it was possible that the smell she had detected in the Respondent's hospital room could have been hospital alcohol, she responded that the smell was not disinfectant alcohol and that the Respondent "smelled like a bar" to her.

Alexander Greenberg

Greenberg, who works as an investor and resides in Manhattan, testified that on November 6, 1998 he resided in an apartment at [redacted], Manhattan. He testified that he got into Goldin's cab at West 67th Street and Broadway and told him that he wanted to be driven to 86th Street and First Avenue. Greenberg testified that Goldin drove safely and did not speed at any time during the ride. He recalled that Goldin slowed down to let him off at the southeast corner of 86th Street and First Avenue. As the cab was entering the intersection, he was looking down, because he was counting cash to pay the driver, and he did not see the car until it "forcibly" struck the right side of the cab. He recalled that there was a loud crash and the cab was pushed up onto the curb into a phone both outside a store. He recalled that he got out of the cab, and because he was in front of the building he resided in, he told the doorman to call the police. He looked at the light blue car that had struck the cab and he saw "severe" damage to the front of the car. He then telephoned his physician who told him that he should immediately go to the emergency room at [redacted] Hospital. He testified that when he was examined the physician told him that he had suffered a broken collar bone as well as a bump on the head and minor bruises.

On cross-examination, when he was asked whether the cab came to a complete stop prior to being hit by the car, he testified that he was not certain that the cab had come to a complete stop before the car struck it. He further testified that he did not believe that the cab had been spun around as a result of the impact.

Joanne Mercado

Mercado, a registered nurse who is presently employed at the Saint Vincent's Hospital, Staten Island, testified that during November, 1998, she worked at [redacted] l Medical Center. She recalled that on November 6, 1998, she was on duty assigned as the assistant head nurse in the emergency room. At about 1:00 a.m., the Respondent was brought into the emergency room on a stretcher. When she looked closely at the Respondent, she saw that he was "soaking wet." She smelled "a strong acetone odor" on the Respondent that was "overwhelming" and she suspected that it "could be alcohol." She also observed a urine puddle on the floor near the Respondent. She asked the Respondent, "Have you been drinking?" He answered, "Yes, I've been drinking alcohol." The Respondent was admitted. At 3:00 a.m., she walked into the Respondent's hospital room. She noticed that when the Respondent spoke to her his speech was slurred and she observed a large puddle of urine on the floor.

On cross-examination, Mercado testified that the Respondent was admitted to the emergency room at approximately 1:00 a.m. At the time of his admission, he was alert, oriented and cooperative, his skin color was normal, his respiration was normal, his skin temperature was warm and dry and his speech was coherent. It was during the initial questioning that the Respondent admitted to drinking alcohol. She testified that the acetone odor she smelled on the Respondent could have been ketoacidosis, but a diabetic patient would have been unconscious giving off that odor and he was not unconscious at that time. He did report a loss of consciousness as a result of the accident. She observed urine on the floor at 3:00 a.m. when he was in a hospital gown. She walked over to him and asked him if everything was okay. His speech was slurred and he was not answering

her appropriately. Because his head had hit the windshield of his car, there was a laceration over the Respondent's left eyebrow. He also could have had a head injury and broken bones. The medical staff was not finished evaluating his injuries. At 3:00 a.m., she called for the attending physician in charge and the trauma team and neurosurgery at that point. His symptoms at that time were consistent with a potential head injury and so tests were ordered regarding that type of injury. She acknowledged that slurring of words could be a symptom of a head injury. I.V. lines were placed on the Respondent as well as sutures and a Foley catheter.

Nicholas Bellizzi

Bellizzi, who is a professional engineer licensed in New York, New Jersey, Connecticut and Pennsylvania, testified that he has been qualified as an expert in accident reconstruction and vehicle occupant kinematics.

Bellizzi testified that he performed a reconstruction of a vehicular accident that occurred on November 6, 1998 at the intersection of 86th Street and First Avenue in Manhattan. He testified that in performing this reconstruction, he utilized the Police Accident Report, two New York State Department of Motor Vehicles Form104s, and the depositions of Goldin, the Respondent and Greenberg. He also examined the photographs taken by Viksne (DX 1, 2, and 3). He testified that he determined that the impact to the cab was so severe that it caused the cab to "spin around" and that the post-impact trajectory of the cab caused it to hit and push a telephone kiosk on the northeast corner of the intersection. He testified that he examined the damage to the cab that is depicted in the photographs (DX 1, 2, and 3). He testified that these photos reflected a

"heavy" impact caused by the "bullet" vehicle, the car, hitting the "target" vehicle, the cab. He further testified that in order for the car to have knocked the cab up onto the curb and into the kiosk, the car must have been traveling a minimum of 43 miles per hour. He testified that the speed limit for all of Manhattan streets is 30 miles per hour. He testified that his estimate of the speed the car was going when it struck the cab might have to be increased depending on what damage occurred to the front of the "bullet" car.

He testified that he had not seen the car or photos of the car and, thus, could not assess the damage to the front of the "bullet" car. He testified that there was "no way" that the car could have stopped at the traffic light at the intersection, started again, and then hit the cab at a speed of 43 miles per hour. He testified that based on the post-impact movement of the cab toward the northeast corner of the intersection, the cab was going approximately 20 miles per hour on impact. He further testified that even if the cab driver had been wearing a seat belt and even if the air bag had deployed, because the car struck the side of the cab while traveling at least 43 miles per hour, the cab driver could still have suffered a spinal injury because he would have been thrown sideways.

On cross-examination, Bellizzi was asked whether the cab would have been able to reach a speed of 20 miles per hour if the cab had come to a full stop at the light at the intersection. He responded that this was possible but that the exact point of impact within the intersection was not clear. When he was asked how the cab would have spun around after the impact, he testified that the cab would have rotated in a counter-clockwise direction.

Matthew Johnson

Johnson, a Criminalist in the Department's Police Laboratory assigned to the Blood Alcohol Analysis Unit who supervises nine employees, testified that he received training at the Department's laboratory and that he has been certified by the New York State Department of Health to test for alcohol content in blood and to report blood testing results. He testified that he has assisted his wife, who is a criminal defense attorney, and Assistant District Attorneys prosecuting criminal cases in interpreting blood testing results contained in medical records. He has performed mathematical conversions of the amount of Ethanol detected in blood samples, usually measured by hospital laboratories in units of milligrams per deciliter, into per cent weight of alcohol by volume, the typical standard of measurement cited in legal statutes which contain standards for alcohol content in blood.

Johnson interpreted the two-page New York Presbyterian Hospital medical record reporting the testing results of blood withdrawn from the Respondent at the hospital on November 6, 1998 (DX 6). Johnson testified that the entry on the first page of this two-page record reflected that the testing results for the sample of blood that was withdrawn from the Respondent showed that it was found to contain Ethanol, or ethyl alcohol, and that the level of Ethanol detected in "units" was "238." He testified that the second page of the medical record shows that the number 238 refers to milligrams per deciliter (reflected by the abbreviation "mg/dL"). Johnson testified that when he converted this Ethanol detection level of 238 milligrams per deciliter into gram per cent, that is per cent by weight of alcohol in the Respondent's blood, the result was .23 of one per cent by weight of alcohol. Johnson testified that during 1998, the New York Vehicle and Traffic

Law section regarding operating a motor vehicle while under the influence of alcohol or drugs defined driving while intoxicated as operating a motor vehicle when there is .10 of one per cent weight of alcohol in the driver's blood.

On cross-examination, Johnson testified that he has not personally collected blood samples and that he only analyzes blood samples which are delivered to the Department's laboratory. He acknowledged that DX 6 does not indicate who took the Respondent's blood sample, how the blood was withdrawn, where on the Respondent's body the blood was drawn or whether an alcohol swab was used when the blood sample was withdrawn. Johnson testified that when blood samples are analyzed at the Department's laboratory, under the procedure the Department uses, whether an alcohol swab was used when the blood sample was withdrawn would not affect the testing result but that it was possible that an alcohol swab could affect a less rigorous testing method.

He testified that in performing conversions of Ethanol detection levels from milligrams per deciliter into per cent by weight of alcohol by volume, if plasma or serum is tested, instead of whole blood, the New York State Department of Health requires that the alcohol content value detected in the blood sample be reduced by ten per cent. Johnson acknowledged that when blood samples are analyzed at the Department's laboratory, chemicals are used to prevent clotting of the blood because clotting could affect the test result. Johnson testified that DX 6 does not contain any sample sealing or chain of custody information nor does it indicate whether chemicals were used to prevent clotting of the blood sample that was tested. DX 6 also does not contain any data regarding the calibration of the instruments used to test the sample or what the

Respondent's temperature and body mass were at the time the sample was collected. He testified that there are many tests which can be used to ascertain alcohol content in blood.

On re-direct examination, Johnson testified that if the Respondent's sample contained plasma or serum instead of whole blood, then, under New York State Department of Health regulations the alcohol content value for the blood sample would have to be reduced by ten per cent for reporting purposes. The result of .23 of one per cent by weight of alcohol would, as a consequence, be reduced to .21 of one per cent, which would still be more than two times the .10 per cent by weight of alcohol that, in 1998, constituted the legal standard of driving while intoxicated.

The Respondent's Case

The Respondent called Police Officers Arthur Olivella and Donald Houvener, Sergeant Patrick Santoli, and he testified in his own behalf.

Police Officer Arthur Olivella

Olivella testified that he was on duty on November 6, 1998, and that his sector car responded to the scene of the accident. He recalled that his car was one of the last sector cars to arrive at the scene. When he arrived, he observed that the Respondent was already on a stretcher. He testified that he stood near the Respondent, by his feet, and that he did not smell any alcohol emanating from the Respondent. No one at the scene told him that the Respondent was intoxicated. He learned that the Respondent was a uniformed member of the service when his shield was handed to him.

He recalled that he telephoned Viksne and told her to come to the hospital. He attempted to interview Goldin. He recalled that Viksne "barged into" the Respondent's room and demanded to know why they were "protecting" the Respondent. Viksne asked them, "Is he going to be tested?" Olivella testified that he understood her to mean tested for alcohol. He told her, "There's no reason to test him." He testified that he prepared an Accident Report (RX A).

On cross-examination, Olivella acknowledged that at the hospital he always remained outside of the Respondent's room and that he had no contact with the Respondent there. He recalled that Goldin told him that he was "going straight." He testified that because there was no reason to believe that the Respondent was intoxicated, he did not call the Highway Unit, which conducts breathalyzer tests, to the scene. He testified that someone at the stationhouse notified the duty captain that the Respondent had been in an accident, but the duty captain did not come to the hospital.

He acknowledged that he accepted a Schedule B Command Discipline for failing to notify the Internal Affairs Bureau regarding the accident. He testified that he attempted to interview the Respondent while doctors and nurses were working on him. Although he recalled that the Respondent had told him that he was driving from his girlfriend's house, the Respondent did not state that he had been drinking alcohol at his girlfriend's house.

Police Officer Donald Houvener

Houvener testified that he was assigned to patrol duties on November 6, 1998, and that when he arrived at the accident scene he approached the passenger front door of

the Respondent's car. He stuck his head inside the car and told the Respondent that he was taking the vehicle registration out of the glove compartment. He estimated that he was three or four feet away from the Respondent at that point in time. He smelled no alcohol on the Respondent. Another officer handed him the Respondent's firearm and shield and he handed them to his partner, Police Officer Olivella.

He and his partner arrived at New York Hospital at 2:30 a.m. He recalled that Viksne was "reasonably pleasant." After a time, Viksne came to the Respondent's room and asked the officers, "Is he going to be tested?" She meant was he going to be subjected to a breathalyzer test. Houvener testified that he told her, "No," because no one believed he was intoxicated.

On cross-examination, he recalled that he first learned that the Respondent was a uniformed member of the service about 15 minutes after he and Olivella arrived at the scene. He testified that he was only three or four feet away from the Respondent, as he was taking the registration out of the glove compartment, he considered himself to be close to the Respondent. He was confronted with a statement he made at his December 21, 1998 official Department interview. At this interview he told his interviewers that he "never got close to" the Respondent. He testified that he recalled asking the Respondent, "What's your name?" He was confronted with a statement he had made at a deposition where he was asked whether he had spoken to the Respondent at all at the scene of the accident, and he had responded, "No." When he was asked whether Viksne had stated that she wanted a toxicology report regarding the Respondent, he answered, "Something like that, yeah."

Houvener acknowledged that he had accepted a command discipline for having failed to notify a supervisor regarding an allegation made by a civilian that a member of the service was intoxicated. He testified that while he was in the Respondent's room, he noticed a puddle of urine next to and underneath the bed. When he was asked whether he knew for a fact at that time that the Respondent was not intoxicated, he answered, "No."

Sergeant Patrick Santoli

Santoli testified that he was on duty on November 6, 1998, assigned as the patrol supervisor for the 19 Precinct. He recalled that when he arrived at the accident scene he smelled no alcohol on the Respondent when he looked into the Respondent's Mazda standing about three feet away from the Respondent. No one at the scene told him that the Respondent, who was semi-conscious, was intoxicated. He did not speak to the Respondent at the accident scene. After about 40 minutes, the Respondent was removed to the hospital. Santoli testified that he telephoned the Operations Unit from New York Hospital to report that the Respondent had been involved in an automobile accident.

On cross-examination, when he was asked whether one of the reasons that he had approached the driver of the Mazda at the accident scene was to ascertain if the driver might be intoxicated, he answered in the affirmative and stated that that is one of the factors the patrol supervisor normally checks on at a vehicular accident scene. He testified that he did not enter the Respondent's room at the Hospital. He recalled that Emergency Service Unit personnel had removed the Respondent's firearm at the same time they removed the Respondent from his car. The Respondent's firearm was handed by ESU to another police officer. That officer handed it to Santoli who took custody of it.

The Respondent

With regard to Disciplinary Case No. 79630/04, the Respondent testified that on November 6, 1998, he had dinner at the Blue Moon Café at 76th Street and First Avenue, Manhattan, and that he drank "one Corona beer" with his dinner. He testified that he had no present recollection of what time he left or of entering his car and driving northbound on First Avenue. The Respondent testified that the "next thing I recall is being pulled out of my car." When the Respondent was asked if he had suffered any injuries, he responded that he believed that he had a concussion, cuts along his head and glass embedded in his head.

With regard to Disciplinary Case No. 77810/02, the Respondent acknowledged that as a result of the incident on January 14, 2002, he was convicted after a jury trial of operating a motor vehicle while he was intoxicated. He was sentenced to serve 60 days in jail and three years on probation. He testified that he attended a 20-day rehabilitation program, that he has attended therapy sessions in the past and that he has attended Alcoholics Anonymous ("AA") meetings. He presently goes to AA meetings "once in a while, not that often." He testified that he is a different person now than he was then, that he has fathered two children since his conviction in 2002, and that he will never again drink alcohol and will never again operate a motor vehicle while under the influence of alcohol.

On cross-examination, the Respondent acknowledged that on January 14, 2002, he had operated a motor vehicle while he was intoxicated as the result of alcohol consumption, that the vehicle he was driving came to a stop in the middle of a road while

it was still running, that responding police officers observed that he appeared to be asleep, that when they awakened him by physically shaking him and splashing water on his face, that he refused to comply with their order to get out of the vehicle, that he struggled with them when they physically removed him, and that he was belligerent, unsteady on his feet, had slurred speech and smelled of alcohol. The Respondent also admitted that he was in possession of his firearm at the time he was intoxicated and that, at the Intoxicated Driver Testing Unit located inside the 28th Precinct, he refused to comply with an order that he submit to a Breathalyzer test and a physical examination.

FINDINGS AND ANALYSIS

Disciplinary Case No. 77810/02

Since the Respondent pleaded Guilty to Specification Nos. 1 through 4, the Respondent is found Guilty of those four Specifications.

The Department moved to dismiss Specification No. 5.

The Assistant Department Advocate stated that the Department could not prove that the Respondent was driving a vehicle which had an expired registration or lapsed insurance on January 14, 2002.

It is recommended that the Department's motion to dismiss this Specification be granted.

Disciplinary Case No. 78003/02

The Department moved to dismiss both of the Specifications charged under this case number because, after further investigation of this incident, the Department

ascertained that on June 19, 2002, the Respondent was not driving with a suspended driver's license and that his license was valid and in effect on that date.

It is recommended that the Department's motion to dismiss these Specifications be granted.

Disciplinary Case No. 79630/04

Introduction: Admissibility of the testing results of blood that was withdrawn from the Respondent at the hospital

It is not disputed that while the Respondent was being treated in the emergency room of New York Presbyterian Hospital ("the hospital") a sample of his blood was withdrawn and analyzed for medical treatment purposes only.

In his decision in which he ordered the hospital to comply with the administrative subpoena *duces tecum* by providing the medical record documenting the Respondent's blood alcohol level, Justice Figueroa held that the Respondent had waived the physician-patient privilege during the course of this trial by attempting to show that his appearance on the date of the accident was attributable to his injuries and not due to intoxication.

Justice Figueroa noted that in her opening statement, Respondent's attorney alleged that the evidence would show that police officers responding to the accident scene did not smell alcohol on Respondent's breath, even though they were near him, and that they did not find any reason to test him for intoxication. Justice Figueroa also noted that during her cross-examination of a nurse who treated the Respondent on the night of the accident, the Respondent's attorney asked if his symptoms, including slurred speech

and inappropriate answers to questions, were consistent with a claimed head injury. Justice Figueroa further noted that during her examination of the Respondent, his attorney asked him if he had suffered any injuries and in her examination of a police officer who arrived at the accident scene, the Respondent's attorney asked him if he recalled the types of injuries on the Respondent's body and whether he was conscious and whether the officer smelled any alcohol in the car.

Justice Figueroa found that the examination and argument by the Respondent's attorney was an attempt to show that his head injury caused him to appear intoxicated when he was not, and that by placing his condition in issue at this trial, the Respondent waived the physician patient privilege and his right to confidentiality that would otherwise bar the hospital from releasing the results of his blood test.

As a result of Justice Figueroa's ruling, the Department was able to obtain and offer in evidence the medical record documenting the Respondent's blood alcohol level at the time he was in the emergency room to establish his level of intoxication at the time the accident occurred. Since the Respondent is charged with driving while in an intoxicated condition, it is clear that the blood testing results constitute relevant evidence. Consistent with Justice Figueroa's ruling and reasoning, the medical record documenting the Respondent's blood alcohol level at the time he was in the emergency room was admitted into evidence (as DX 6) solely for the purpose of allowing the Department to establish the Respondent's level of intoxication at the time the accident occurred.

Specification No. 1

It is charged that the Respondent, while off duty on November 6, 1998, at approximately 0110 hours, in the vicinity of First Avenue and East 86th Street, New York County, under circumstances evincing a depraved indifference to human life, recklessly engaged in conduct which created a grave risk of death to Goldin and thereby caused serious physical injury to Goldin. This charge cites to (and the wording of this Specification mirrors the language of) the crime of Assault in the First Degree.

The question presented is whether the Department proved that the Respondent acted "under circumstances evincing a depraved indifference to human life."

The New York Court of Appeals has held that "depraved indifference to human life" means "conduct beyond being reckless" and which is "so wanton, so deficient in a moral sense of concern, so devoid of regard of the life or lives of others, and so blameworthy as to warrant the same criminal liability as that which the law imposes upon a person who intentionally causes" the harm that is suffered by the victim. People v. Fenner, 61 NY2d 971, 973. A review of appellate decisions dealing with the issue of under what circumstances a person can be said to have acted under circumstances evincing a depraved indifference to human life indicates that the evidence presented here does not sufficiently establish that the Respondent acted with the culpable mental state of depraved indifference to human life. See People v. Feingold, 7 NY3d 288.

The Respondent is found Not Guilty of Specification No. 1.

Specification Nos. 2 and 8

It is charged under these two Specifications, that the Respondent, while off duty on November 6, 1998, at approximately 0110 hours, in the vicinity of First Avenue and East 86th Street, New York County, committed the crime of Assault in the Second Degree in that he recklessly caused serious physical injury to Goldin by means of a deadly weapon or a dangerous instrument, a motor vehicle, and that he operated this motor vehicle having .10 of one percent or more by weight of alcohol in his blood.

It is clear that the Respondent's car constituted a dangerous instrument since the Penal Law defines dangerous instrument as any instrument, including a vehicle, which, under the circumstances in which it is used or attempted to be used is readily capable of causing death or other serious physical injury. Penal Law § 10.00(13).

The questions presented are whether the Department proved that the Respondent acted recklessly, whether he caused serious physical injury to Goldin, and whether he operated this motor vehicle having .10 of one percent or more by weight of alcohol in his blood.

A person acts recklessly with respect to an injury when such person is aware of and consciously disregards a substantial and unjustifiable risk that such injury or death will result from his or her conduct. The degree of risk must be such that a disregard of the risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation and a person who creates the requisite risk cannot claim a lack of awareness of the risk solely by reason of voluntary intoxication. Penal Law § 15.05(3). Since recklessness is defined as conscious disregard of a substantial risk, it encompasses the risks created by a person's conduct in getting drunk.

I credit the testimony of Bellizzi, an expert in accident reconstruction and vehicle occupant kinematics, that in reconstructing this vehicular accident, he determined that the impact to the cab was so severe that it caused the cab to spin around, be knocked up onto the curb and into a kiosk and that the damage to the cab depicted in the photographs (DX 1, 2, and 3) reflected that the car must have been traveling a minimum of 43 miles per hour. He testified that the speed limit for all of Manhattan streets is 30 miles per hour. He further testified that even if the cab driver had been wearing a seat belt and even if the air bag had deployed, because the car struck the side of the cab while traveling at least 43 miles per hour, the cab driver could still have suffered a spinal injury because he would have been violently thrown sideways.

Based on this testimony, I find that at the time that the Respondent's vehicle struck the cab, the Respondent was committing a moving violation in that he was driving his car at a speed of over 40 miles per hour when it struck the cab, 10 miles per hour over the posted speed limit, and that Goldin's injuries (DX 5) were a direct result of this moving violation.

I also credit the testimony of Johnson, who is certified by the New York State Department of Health ("DOH") to determine alcohol content in blood and to report blood testing results, that the medical record reporting the testing of blood withdrawn from the Respondent at the hospital on November 6, 1998 (DX 6), showed that the blood sample contained Ethanol at a level of 238 milligrams per deciliter and that when this figure is converted into per cent by weight of alcohol, the result is .23 of one per centum by weight of alcohol. It is not disputed that during 1998, the New York Vehicle and Traffic Law defined driving while intoxicated as operating a motor vehicle when there is .10 of

one per centum weight of alcohol in the driver's blood. I further credit Johnson's testimony that even if the Respondent's blood sample contained plasma or serum instead of whole blood, since DOH requires that the per centum by weight of alcohol result be reduced by only ten per cent, the conversion into per cent by weight of alcohol would produce a result of .21 of one per centum.

Since the Respondent's blood sample, which was collected at 2:40 a.m. (DX 6) soon after he had arrived at the emergency room, contained more than two times the per .10 centum by weight of alcohol that (in 1998) constituted the legal cut-off level for determining legal intoxication, I find that the Respondent was driving while intoxicated at the time his car slammed into the cab.

In People v. Bell, 112 AD2d 27, a case whose facts are similar to the facts presented here, the Appellate Division affirmed a criminal conviction for recklessly causing serious physical injury by means of a dangerous instrument, a motor vehicle, finding that the evidence supported the finding that a driver had acted recklessly. In that case, as here, the driver not only operated his automobile while he was intoxicated, he also committed a moving violation. In that case, the driver pulled out to pass the car in front of him while he was in a no-passing zone, which caused him to hit another vehicle resulting in serious physical injury to the driver of the other vehicle, who suffered a broken nose, a lacerated lip and a scar on her hand. The victim in that case underwent two surgical operations to repair the lacerations and to alleviate her breathing problems. Since it is clear that the injuries suffered by Goldin (DX 5), who does not have full mobility in his arms and legs, are more severe than the injuries in the cited decision,

Goldin's injuries constitute "serious physical injury," as Respondent's counsel acknowledged. (Transcript p.105 and 106)

Since the court in the Bell case found that the cited evidence was sufficient to support the driver's conviction for recklessly causing serious physical injury to another person by means of dangerous instrument, I find that the evidence presented here is sufficient to support a finding that the Respondent recklessly caused serious physical injury to Goldin.

The Respondent is found Guilty of Specification Nos. 2 and 8.

Specification No. 4

Under Specification No. 4, the Respondent is charged with committing the crime of Assault in the Third Degree by recklessly causing physical injury to Goldin.

Since this crime constitutes a lesser included offense with regard to the crime of Assault in the Second Degree, since the Department proved that Goldin suffered not just physical injury but serious physical injury, and since the Respondent's reckless criminal conduct is adequately addressed by the finding above under Specification No. 2, it is recommended that Specification No. 4 be dismissed.

Specification Nos. 3 and 5

Under Specification No. 3, it is charged that the Respondent, while off duty on November 6, 1998, at approximately 0110 hours, in the vicinity of First Avenue and East 86th Street, New York County, committed the crime of Vehicular Assault in the Second Degree, in that with criminal negligence he caused serious physical injury to Goldin by

operation of a motor vehicle in violation of subdivision three of section eleven hundred ninety-two of the Vehicle and Traffic Law. Under Specification No. 5, it is charged that the Respondent committed the crime of Assault in the Third Degree in that with criminal negligence he caused physical injury to Goldin.

Since a criminally negligent culpable mental state is included within the higher mental culpability state of reckless for the purpose of determining a lesser included offense, criminally negligent assault is a lesser included offense of reckless assault.[3] Since the Respondent's reckless criminal conduct is adequately addressed by the finding under Specification No. 2, it is recommended that Specification Nos. 3 and 5 be dismissed.

Specification No. 6

The Department moved to Dismiss Specification No. 6. The Assistant Department Advocate stated that the Department could not prove that the Respondent intended to use his vehicle unlawfully against Goldin. It is recommended that the Department's motion to Dismiss Specification No. 6 be granted.

Specification Nos. 7 and 9

The Respondent is charged under these Specifications with operating a motor vehicle while under the influence of alcohol. The subject matter of these charges is the same as that charged under Specification No. 8.

[3] See People v. Stanfield, 1975, 36 N.Y.2d 467, 369 N.Y.S.2d 118; People v. Green, 1982, 56 N.Y.2d 427, 452 N.Y.S.2d 389.

Under Specification No. 9, it is charged that the Respondent operated a motor vehicle while in an intoxicated condition. This charge is redundant since Specification No. 8 implicitly charged that the Respondent operated a motor vehicle while he was intoxicated. Since the Respondent's criminal conduct of driving while drunk is adequately addressed by the finding under Specification No. 8, it is recommended that this Specification be dismissed.

Under Specification No. 7, it is charged that the Respondent operated a motor vehicle while his ability to operate the vehicle was impaired by the consumption of alcohol. Since this charge constitutes a lesser offense in relation to the crime charged in Specification No. 8 [4] and since the Respondent's misconduct of operating a motor vehicle under the influence of alcohol is adequately addressed by Specification No. 8, it is recommended that this Specification also be Dismissed.

Specification No. 10

Since the Respondent's main misconduct of recklessly operating a motor vehicle while intoxicated and causing Goldin to suffer serious physical injury, is adequately addressed by Specification Nos. 2 and 8, it is recommended that this property damage charge, which constitutes a misdemeanor, also be Dismissed.

[4] The crime of driving while intoxicated requires a showing that the defendant is incapable of employing the physical and mental abilities which she/he is expected to possess in order to operate a vehicle as a responsible and prudent driver, while the lesser offense of driving while impaired requires only a showing that the defendant's ability to operate a vehicle was impaired to some extent. People v. McNamara, 269 A.D.2d 544 (2nd Dep't 2000).

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974).

The Respondent was appointed to the Housing Authority Police Department on April 25, 1990. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Respondent has been found Guilty under Disciplinary Case No. 79630/04 of, on November 6, 1998, recklessly operating a motor vehicle while he was intoxicated which resulted in his vehicle striking a taxicab causing serious physical injury to the driver.

Under Disciplinary Case No. 77810/02, the Respondent admitted that on January 14, 2002, he operated a motor vehicle while he was intoxicated as the result of alcohol consumption, that the vehicle he was driving came to a stop in the middle of a road while it was still running, that police officers observed that he appeared to be asleep, that when they awakened him by physically shaking him and splashing water on his face, that he refused to comply with their order to get out of the vehicle and struggled with them when they physically removed him, and that he was belligerent, unsteady on his feet, had slurred speech and smelled of alcohol. The Respondent has also admitted that he was in possession of his firearm at the time he was intoxicated and that, at the Intoxicated Driver Testing Unit located inside the 28th Precinct, he refused to comply with an order that he submit to a Breathalyzer test and a physical examination.

The Respondent operated a motor vehicle while he was intoxicated only three years after he had operated a vehicle while intoxicated and caused an accident which

resulted in serious physical injury to the driver of the taxi his vehicle struck. The Respondent asserted at this trial that he is a changed man and that he no longer drinks alcohol. However, based on his testimony that he presently attends Alcoholics Anonymous meetings only "once in a while, not that often," his claim that he is certain that he will never again drink alcohol or engage in alcohol-related misconduct is not convincing, and the reliability of his assertion that the Department can rest assured that he will never again operate a motor vehicle while under the influence of alcohol is open to question.

I recommend that the Respondent be DISMISSED from the New York City Police Department.

Respectfully submitted,

Robert W. Vinal
Assistant Deputy Commissioner - Trials